UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/798
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 798

Case No. 885: CLAXTON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, First Vice-President, presiding; Mr. Hubert Thierry, Second Vice-President; Ms. Deborah Taylor Ashford;

Whereas, on 1 November 1995, Catherine Claxton, a staff member of the United Nations, filed an application containing, inter alia, the following pleas:

"... that the Tribunal find:

That the Secretary-General, in implementing the provisions of the Settlement Agreement, denied the Applicant due process in the determination of the proper category for the post JD NO3173, ...

that:

(i) Statements by the Applicant's former supervisors as to the proper category of the post were conclusive;

(ii) As a result, the duties of post JD NO3173, which were Professional in nature, should be classified in that category ...

To order:

(a) That the decision of the Secretary-General of 8 May 1995 to accept the recommendations of the ad hoc New York General Service Classification Appeals and Review Committee be rescinded; and

(b) That the post be classified at the appropriate level in the Professional category and the Applicant be promoted against it according to established rules and administrative instructions;

Or, failing the above, that:

(c) The case be remanded for a review that includes all components of due process, including the provisions of paras. 2 and 3 of the Settlement Agreement, as well as the applicable ICSC [International Civil Service Commission] policies and guidelines."

Whereas the Respondent filed his answer on 14 February 1996;

Whereas the Applicant filed written observations on 12 April 1996;

Whereas, on 6 August 1996, the Applicant filed an amendment to her pleas to include a request that the Tribunal order the production by the Respondent of certain documentation relating to the consideration of the classification of her post;

Whereas, on 18 September 1996, the Respondent submitted his comments on the Applicant's request, noting that this documentation was not properly discoverable;

Whereas, on 7 and 24 October 1996, the Applicant submitted comments on the Respondent's memorandum of 18 September 1996;

Whereas, on 4 November 1996, the Tribunal rejected the Applicant's request for production of further documents concerning her case;

Whereas, on 14 November 1996, the Tribunal put a question to the Respondent to which he provided an answer on 15 November 1996;

Whereas, on 14 November 1996, the Tribunal requested both the Applicant and the Respondent to provide it with written waivers of the confidentiality obligations under the Settlement Agreement of 22 December 1994 with respect to the classification issues in dispute;

Whereas, on 15 November and 18 November 1996, respectively, the Respondent and the Applicant filed such written waivers with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 4 February 1974, on a three-month, fixed-term appointment as a Cashier at the G-2, step III level, in the Department of Public Information. Her appointment was extended for one year, through 3 May 1975 and then for one month, through 3 June 1975, when she separated from the Organization. The Applicant re-entered the service of the Organization on 19 July 1976, on a three-month, fixed-term appointment as a Bilingual Clerk at the G-3, step II level, in the Office of Personnel Services (OPS). On 19 October 1976, her appointment became probationary and, on 1 October 1977, permanent. On 1 April 1979, the Applicant was promoted to the G-4, step I level, as Senior Bilingual Clerk.

In July 1982, the International Civil Service Commission (ICSC) approved the establishment of a seven-level grading structure (to replace the former five-level structure) for the General Service category in New York and promulgated job classification standards for the seven levels. In accordance therewith, all General Service posts in New York were classified under procedures set out in administrative instruction ST/AI/301 of 10 March 1983. A description of the post encumbered by the Applicant was prepared for initial classification and submitted to the Classification Service. The Applicant signed administrative form P-270, certified by the Executive Officer, OPS, on 7 August 1984. The Applicant's post was initially classified at the G-6 level.

On 13 June 1984, the Assistant Secretary-General, OPS, announced to the staff, in ST/IC/84/45, the establishment of the Classification Review Group "to review the overall results of the classification exercise currently being urdertaken in respect of

posts in the General Service and related categories in New York". On 23 December 1985, the Executive Officer, OPS, informed the Applicant that the Classification Review Group had, in accordance with ST/IC/84/45, classified her post as "Recruitment Assistant" at the G-7 level.

The Applicant's appeal against the categorization and classification of this post was considered by the Tribunal in its Judgement No. 560, Claxton (1992). The Tribunal held that the Applicant's appeals against the classification of her post were time-barred (cf. paragraph II). In any case, the Tribunal found that there were no "procedurally or prejudicial defective" actions taken by the Administration on her appeal against her classification (cf. paragraph III). Furthermore, the Tribunal found "no connection between allegations of sexual harassment made by the Applicant against a senior official of the Organization and either the post classification, the issue of time-bar, or any issue related to the inconsistency review".

The Secretary-General appointed Justice Mella Carroll of the High Court of Ireland to examine the allegations of sexual harassment. By memoranda dated 1 February 1994, the Secretary-General forwarded a copy of Justice Carroll's report on the allegations of sexual harassment, adding that the report was released on a confidential basis, with the finding, inter alia, that sexual harassment had been proved, and added:

> "3. I have taken note of the findings of Justice Carroll. In the light of these findings and in view of the resignation of [the Associate Administrator, UNDP] and of the Tribunal's earlier finding that there were no irregularities in the classification decisions you had appealed, I have decided that this matter now be closed."

On 4 February 1994, counsel for the Applicant wrote to the Secretary-General requesting an "urgent meeting" to discuss, inter alia, damages, counsel fees and costs to be awarded to the

Applicant, publication of Justice Carroll's findings and reapplication to the Tribunal in light of Justice Carroll's report.

In a reply dated 9 February from the Principal Legal Officer, General Legal Division, Office of Legal Affairs, the Secretary-General denied the payment of the Applicant's legal fees and costs and reaffirmed his decision to maintain the confidentiality of the report; he noted, however, that the Applicant could submit a copy of the report, on a confidential basis, to the Tribunal for purposes of any application she may make thereto. The Secretary-General also acknowledged the Applicant's right to apply directly to the Tribunal for review of the above decisions.

On 10 February 1994, the Applicant requested the Secretary-General to review the administrative decisions set forth in the memorandum of 9 February 1994. On 30 March 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 29 July 1994. It concluded that the Applicant had suffered a sexual assault and unanimously recommended awards of damages to compensate her both for this and for the conduct of the Administration following her allegations of sexual harassment; it also recommended the payment of the Applicant's attorney's fees and costs.

The Secretary-General took no decision on the JAB's recommendation but, instead, the parties entered into settlement negotiations. On 22 December 1994, the parties executed a Settlement Agreement, by which they settled "the matters that were in issue in Catherine Claxton's appeal to the Tribunal in respect of Report No. 1099 of the Joint Appeals Board, and in respect of the recommendations therein, dated 29 July, 1994". The Settlement Agreement also provided a mechanism for the classification of the Applicant's former post by the New York General Service Classification Appeals Review Committee, sitting as an ad hoc Committee for this purpose (hereinafter "the Committee").

As authorized by the Settlement Agreement, on 20 February 1995, the Applicant submitted a statement of appeal to the Committee. According to that Committee's Case Findings and Recommendations, the Applicant's statement of appeal was transmitted to the Compensation and Classification Service on 22 February 1995, which submitted its views on 15 March 1995. The Compensation and Classification Service concluded that "the duties and responsibilities of the Applicant's post are, ... appropriately classified in the General Service category". Those comments were transmitted to the Applicant on the same day and she submitted written observations on 30 March 1995.

The Committee's report discussed the submissions, and it made recommendations and findings, which read, in part, as follows:

> "The Committee referred, for [determining the classification of the post], to the ICSC methodology for distinguishing between Professional and Non-Professional posts and to the instructions for identifying the CCOG [Common Classification of Occupational Groups] code of the job.
>
> ...
>
> 13. The Committee concluded unanimously that while tasks 2 b) and h) of the revised job description contained elements which were Professional in nature, these were not, in and of themselves, sufficient to allocate the post to the Professional category, and that the post taken in its entirety was appropriately allocated in the General Service Category."

In a letter dated 8 May 1995, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

> "I enclose a copy of the Case findings and recommendations of the New York General Service Classification Appeals and Review Committee (ad hoc) (hereafter 'the Committee') which had been established pursuant to Annex C of the Settlement Agreement to consider your appeal concerning the classification of your former post of Recruitment Assistant.

> The Committee unanimously concluded that 'the post taken in its entirety was appropriately located in the General Service category' ... and recommended '... that the post be maintained in the General Service category'.
>
> I have carefully examined the Committee's report and accept its reasoning and resultant recommendation that the classification of your former post of Recruitment Assistant at the GS-7 level in the General Service category was correct and consequently its classification at that level is maintained."

On 22 May 1995, the Applicant wrote to the Under-Secretary-General for Administration and Management requesting a copy of the Committee's minutes. In a letter dated 26 June 1995, the Under-Secretary-General for Administration and Management drew the attention of the Applicant to paragraph 10 of the Settlement Agreement as follows:

> "I draw to your attention that paragraph 10 of Annex C to the Settlement Agreement provides as follows:
>
> > '10. The Committee will submit, within 45 days of the receipt of [the Applicant's] observations on the Answer, its Report to ... [the Under-Secretary-General for Administration and Management], who will act on the report within twenty-one (21) days following submission thereof. If the recommendation of the Committee is rejected, the letter advising [the Applicant] of such rejection will contain a reasoned analysis setting out the basis of the rejection to enable [the Applicant] to appeal that decision directly to the Tribunal.'
>
> The ad hoc Committee delivered its Report on 27 April 1995 and I accepted that recommendation on 8 May 1995 and so informed you. The Settlement Agreement does not envisage further steps in relation to the classification review which is now closed.
>
> If you dispute this conclusion an attachment to the Settlement Agreement provides: 'In the event the Settlement Agreement gives rise to a dispute, pursuant to its terms, the UN agrees that such dispute may be submitted directly to the UNAT' (your memorandum of 22 December 1994 to [the Executive Secretary of the Administrative Tribunal])."

By a memorandum dated 10 July 1995 to the Secretary-General, the Applicant sought a review of this decision under staff rule 111.2(a). By a letter dated 3 August 1995, the Under-Secretary-General for Administration and Management replied to the Applicant as follows:

> "I have carefully reviewed my decision to accept the recommendation of the Committee and confirm my view that the Settlement Agreement requires that any further recourse that you wish to undertake in respect of my action to accept the recommendation of the Committee and treat this matter as final must be in accordance with the Settlement Agreement which established the Committee, the recommendation of which you seek to impugn.
>
> Your rights in this matter are defined by the terms of the Settlement Agreement which you signed after review by your outside counsel. The Settlement Agreement provides, both in paragraph 6 and in paragraph 10 of Annex C thereto, that your only avenue for appealing actions taken pursuant to the Settlement Agreement, or for resolution of disputes arising thereunder, is by direct submission of such dispute to the Administrative Tribunal. Accordingly, you may not appeal to the JAB. Moreover, any submission of an appeal to the JAB would contravene the confidentiality provision set forth in para. 8 of the Settlement Agreement. We expect that you will honour the clear terms of the Settlement Agreement with respect to both the appeals procedures envisaged thereunder and the confidentiality provisions thereof."

On 1 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. In implementing the Settlement Agreement, both the Committee and the Respondent committed procedural violations that denied the Applicant due process. Specifically, that Committee's report neither followed the ICSC's established procedural guidelines for classification of posts nor did it, in contravention of the terms of the Settlement Agreement, provide reasoned considerations for the Committee's recommendation that the Applicant's post remain

classified as a general service post. The Respondent, in accepting the Committee's findings, did not provide a reasoned analysis for the classification of the Applicant's post.

2. The statements provided by the Applicant's former supervisors interpreting the nature of the post at issue are by themselves conclusive as to the proper classification of that post.

Whereas the Respondent's principal contentions are:

1. The Settlement Agreement ended the dispute between the parties on a confidential basis. The only matter subject to adjudication is whether the Settlement Agreement has been implemented.

2. Article 2 and Annex C of the Settlement Agreement have been properly implemented. The recommendation and decision of the Committee are reasoned, its report reflects the submissions of the parties, its procedure accorded the parties due process and its recommendation was a valid exercise of discretion, in accordance with its terms of reference.

The Tribunal, having deliberated from 31 October to 21 November 1996, now pronounces the following judgement:

I. The issue before the Tribunal is whether the Respondent has fulfilled his obligations under the Settlement Agreement of 22 December 1994, between the Applicant and the Respondent. The Applicant initially advised the Tribunal, on 10 July 1995, that she intended to pursue her case before the Joint Appeals Board (JAB). On 3 August 1995, the Under-Secretary-General for Administration and Management advised the Applicant that:

> "The Settlement Agreement, signed by you after review by your outside counsel, provides, both in paragraph 6 and in paragraph 10 of Annex C thereto, that your only avenue for

> appealing actions taken pursuant to the Settlement Agreement, or for resolution of disputes arising thereunder, is by direct submission of such dispute to the Administrative Tribunal, not to the JAB."

The Applicant then filed her appeal with the Tribunal on 1 November 1995. The Applicant contends that direct submission to the Tribunal of a dispute over the agreement is a prerogative to be exercised by her if she wishes but that she is not precluded from appealing first to the JAB. The Tribunal disagrees with this assertion. Paragraph 6 of the Settlement Agreement clearly states that any dispute arising in connection with the agreement "shall, if she wishes to appeal, unless settled amicably by the parties hereto, be submitted by [the Applicant] directly to the United Nations Administrative Tribunal."

II. The dispute that has arisen between the parties to the Settlement Agreement relates to the proceedings instituted by the Applicant to appeal the classification of the post she held from 10 October 1977 to 18 October 1987 in the General Recruitment Section of the Office of Personnel Services. Annex C to the Settlement Agreement sets forth the procedures to be followed for the classification appeal, and Attachment I to the Settlement Agreement is the revised job description which was submitted by the Applicant to the New York General Service Classification Appeals and Review Committee (the Committee).

III. The Tribunal notes in regard to this aspect of the Applicant's claims, that it has previously ruled that review of the classification of the Applicant's post was time-barred. (Judgement 560, Claxton (1992)). However, by the terms of the Settlement Agreement entered into after Judgement No. 560 was rendered, the Applicant's right to have the post classification reviewed was established. In addressing the Applicant's claim

related to classification, the Tribunal notes that there were exceptional circumstances which led to the negotiation of a Settlement Agreement between the parties. The Tribunal finds that, as a consequence, a new procedural right to request a review has been created for the Applicant, who now invokes this right. This right is not affected by the doctrine of res judicata.

IV. Having considered the Applicant's appeal, the Committee issued its report on 27 April 1995. Its recommendation was that the post be maintained in the General Service category. This recommendation was accepted by the Under-Secretary-General for Administration and Management on 8 May 1995. It is this decision which the Applicant contests.

V. The Settlement Agreement provides in Annex C, paragraph 10 that "if the recommendation of the Committee is rejected, the letter advising [the Applicant] of such rejection will contain a reasoned analysis setting out the basis of the rejection to enable [the Applicant] to appeal that decision directly to the Tribunal." The Applicant is unhappy with the report of the Committee and claims that it does not provide a "reasoned analysis" of its recommendation.

VI. The Tribunal notes that the provision of the Settlement Agreement which requires that a "reasoned analysis" be set forth, no doubt contemplates circumstances other than those which prevailed, namely that the Under-Secretary-General would reject a recommendation from the Committee which was favourable to the Applicant. Nevertheless, it is clearly within the spirit of the Settlement Agreement that the Applicant should have the right to appeal an adverse decision on the basis of a reasoned explanation, and the Tribunal will interpret the agreement broadly in this respect.

VII. The Tribunal has, in this context, carefully reviewed the report of the Committee. Firstly, it finds that the Committee does provide a sufficiently reasoned analysis of its recommendation to give the Applicant an understanding of the thought process which led to the recommendation. The Committee examines methodically the course of its deliberations and the results of its examination of the various functions of the post in question. The duties of the post are specifically discussed in the report and the Committee concludes that certain tasks in the job description were professional in nature, but that these tasks "were not, in and of themselves, sufficient to allocate the post to the Professional category". The Tribunal finds that the Committee's report contains a reasoned analysis which satisfies the requirements of the Settlement Agreement.

VIII. For this reason, the Tribunal finds it is not necessary to look beyond the report of the Committee and has rejected the Applicant's request for the production of additional documents which are not required by the Settlement Agreement.

IX. The Applicant contends that the introduction by the Administration of a job description other than the one referred to in the Settlement Agreement violated that agreement and compromised the proceedings of the Committee. The Applicant's contention is based on her understanding that the Settlement Agreement provides that only the job description attached thereto could be submitted. The Tribunal does not agree. The Settlement Agreement states that the Applicant may submit to the Committee "the revised job description attached hereto as Attachment I together with a statement of appeal seeking its reclassification." Nowhere is it stated that this will be the only document to be taken into consideration by the Committee. The Tribunal finds that, while the purpose of this provision was to establish the revised job

description as the basis for the Committee's consideration, the provision does not preclude the Respondent from also submitting a previous job description as a point of reference. Instead, had the Committee chosen to disregard the revised job description, the Settlement Agreement would have been violated. The fact that the Committee was provided with the previous job description does not, in itself, violate the Settlement Agreement.

X. The Applicant acknowledges the jurisprudence of the Tribunal which establishes that it is not the function of the Tribunal to substitute its judgement for that of the Administration in job classification matters (Judgement No. 396, Waldegrave, (1987)). The Applicant states that she is not asking the Tribunal to determine whether the methodology established by the International Civil Service Commission (ICSC) was applied properly but "whether it has been applied at all". It is clear to the Tribunal that the ICSC methodology has been applied. The manner in which it has been applied is explained in the Committee's report. In fact, ICSC guidelines were used by the Committee to reject several arguments made by the Applicant. For example, the Applicant argues that her functions were performed before and after she encumbered the post in question by professional level staff members. The Committee's report notes that this consideration cannot be used as a basis for its examination in accordance with the job classification standards issued by ICSC. The Committee's report similarly rejects the Applicant's analysis of the post under the ICSC Master Standard on the grounds that job classification procedures require the category of the post to be determined first, before application of the Master Standard. The report makes repeated references to the ICSC methodology for distinguishing between professional and non-professional posts. In the light of all this evidence, the Tribunal finds that the Committee did apply the methodology established by the ICSC in considering the proper classification of the post.

XI. The Tribunal cannot substitute its judgement for that of the CARC. Having reviewed the Committee's proceedings and its report, the Tribunal finds that the process was fair and was carried out in accordance with the Settlement Agreement. There is no evidence that the process was tainted by prejudice or other extraneous factors.

XII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Luis de POSADAS MONTERO
First Vice-President, presiding

Hubert THIERRY
Second Vice-President

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

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AT/DEC/799
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 799

Case No. 886: OUDEH

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry, Vice-President; Mr. Francis Spain;

Whereas, on 25 October 1995, Muti' Mohammed Oudeh, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal to order:

"a. Payment of the Applicant's separation benefits in US dollars at the UN operational rate of exchange as available on 31 May 1992, of US$ 1 = LS 11.20.

b. Payment of legal counselling and secretarial expenses and fees estimated at US$ 400.-."

Whereas the Respondent filed his answer on 25 April 1996;

Whereas the Applicant filed written observations on 5 September 1996;

Whereas the facts in the case are as follows:

The Applicant, an UNRWA area staff member, entered service on 31 October 1972, on a fixed-term appointment as a Teacher in the Syrian Arab Republic (SAR). With effect from 1 September 1973, he was granted a temporary indefinite appointment, at the grade 4, step VII level.

On 1 January 1992, the Respondent's book exchange rate for US dollars in the SAR changed from 11.20 Syrian pounds to the US dollar, to 26.60 Syrian pounds to the US dollar. On 5 January 1992, the Director of UNRWA Affairs, SAR, issued Field Staff Circular No. 17/92. This Circular stated that the Commissioner-General had agreed that qualifying staff members who opted for early voluntary retirement during the period 1 January 1992 to 29 February 1992 would, exceptionally, receive their retirement benefits using the UN Operational Exchange Rate of 11.20. The Circular went on to state that these exceptional rules were valid only until 29 February 1992. Thereafter, the new UNRWA Book Exchange Rate of 26.60 would apply.

On 15 January 1992, the Medical Officer of the Damascus Training Centre requested that the Applicant be referred to a medical board to determine whether he was fit for service with the Agency (the "First Medical Board"). On 29 April 1992, the First Medical Board concluded that he was fit for service. In a letter dated 16 May 1992, the Field Personnel Officer, SAR, notified the Applicant of this finding. On 21 April 1993, the Applicant wrote to the Principal of the Damascus Training Centre and again requested a referral to a medical board because he suffered from chronic laryngitis and was having difficulty speaking.

On 30 September 1993, the Applicant was referred to a second medical board (the "Second Medical Board"), which concluded, on 13 January 1994, that the Applicant was unfit for further service with the Agency as an instructor but could fulfil administrative duties.

On 21 February 1994, the Field Personnel Officer, SAR, wrote to the Applicant to advise him that, in the light of the Second Medical Board's conclusion, the Agency had decided to terminate his services on medical grounds with effect from 27 October 1994, given that no suitable alternate posts were available.

In June 1994, the Applicant wrote to the Field Administration Officer, SAR, requesting payment of his termination benefits in US dollars at the exchange rate of 11.20 Syrian pounds to the US dollar. This request was denied by a memorandum dated 1 September 1994, from the Chief, Personnel Services Division. He informed the Applicant that his termination benefits would be paid at the rate applicable at his separation date. On 16 October 1994, the Applicant reiterated his request to the Commissioner-General.

On 16 October 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB), which adopted its report on 29 May 1995. Its evaluation, judgement and recommendation read, in part, as follows:

> IV. Evaluation and judgement
>
> 17. In its deliberations, the Board dwelt on the preliminary issue of the receivability of the case and found that the Appellant submitted a letter on 16 October 1994 to the Field Office Director explaining his case to him and requesting that his separation benefits be calculated at the exchange rate of SYP 11.20 to the dollar. This letter was submitted in Arabic and was found by the Board in the Appellant's personal file. It was also submitted simultaneously with the letter of appeal addressed to the Board Secretary.
>
> The Board noted that the Appellant never received a response to the said letter.
>
> The Board, therefore, resolved that the Appellant fulfilled the requirement of paragraph 2 of Area staff rule 111.3.
>
> The Board then considered the merits of this case and [found] the following:

A. The Appellant has been suffering from chronic laryngitis since January 1990, a disease which is adversely affected by the use of his voice as an instructor.

This is evident in the medical report dated 5 April 1995 given to the Appellant by Dr. [X], a medical specialist.

B. The Appellant has been requesting to be referred to a medical board since 1991.

C. The Board noted that the reason for which the Appellant was referred to a medical board on both occasions, i.e. in 1992 and in 1993, was that he suffered from chronic laryngitis, an illness that is adversely affected by the use of one's voice as was the case with the Appellant in his work as an instructor.

The First Medical Board held on 29 April 1992 concluded that the Appellant was fit for further service with the Agency while the Second [Medical] Board that was held on 13 January 1994 concluded that the Appellant was unfit for service as an instructor.

D. The Board noted that the conclusions of both medical boards were based on the same health condition which the Appellant suffered; the First Medical Board held in April 1992 found the Appellant fit, while the Second Medical Board held in January 1994 found the Appellant unfit for further service as an instructor.

In this context, and while the Board acknowledges that it cannot substitute its opinion on medical matters for that of a medical board, the Board is of the opinion that the finding of unfitness in January 1994 necessarily means that the Appellant must have been unfit in April 1992.

E. The Board also took note of Field Staff Circular 17/92 of 5 January 1992, according to which staff members who left the Agency's service on early retirement between 1 January and 29 February 1992, received their separation benefits calculated at the exchange rate of SYP 11.20 to 1 US dollar.

In this context, the Board resolved that, had the Appellant been declared unfit for service in 1992, the said Staff Circular should have been applied in his case in calculating his separation benefits.

Recommendation

18. In view of the foregoing, the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed with a view to calculating the Appellant's separation benefits at the exchange rate of SYP 11.20 to the US dollar.

On 14 August 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB's report and informed him as follows:

> "... You will note that the Joint Appeals Board concluded that you were unfit for service in 1992; it has recommended that the administrative decision to the contrary be reviewed and that your separation benefits be calculated at the exchange rate in effect in 1992.
>
> I have carefully reviewed the Board's report but do not agree with its conclusions and recommendations. You suffered from a progressive chronic laryngitis condition which worsened over time. The finding of the First Medical Board, that you were fit for continued service as a teacher, is consistent with the findings of the Second Medical Board and is supported by the evidence. In my view the Joint Appeals Board has improperly substituted its judgement for that of a medical board. Therefore, your appeal is dismissed.
>
> ..."

On 25 October 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision not to accept the recommendation of the JAB to calculate his separation benefits at the rate of 11.20 Syrian pounds to the US dollar is flawed by mistake of facts and error of law.

2. The Applicant's termination indemnity should have been calculated at the rate available at the time of his first medical examination.

Whereas the Respondent's principal contention is:

The Applicant's termination benefits were properly paid in US dollars calculated at the rate of exchange prevailing at the time of his termination and not at any other, more advantageous, rate of exchange.

The Tribunal, having deliberated from 5 November to 21 November 1996, now pronounces the following judgement:

I. The Applicant requests the Tribunal to order that his separation benefits be paid at the United Nations Operational Rate of Exchange in effect on 29 February 1992, i.e., at a rate of 11.20 Syrian pounds to the US dollar, as opposed to the new UNRWA Book Exchange Rate of 26.60 Syrian pounds to the US dollar, which applied after 29 February 1992 and to which the Applicant was subject by virtue of the fact that he separated from service in 1994. The Joint Appeals Board (JAB) found that, as on 29 April 1992, the Applicant was unfit for service, his separation benefits should be calculated at the exchange rate in effect prior to 29 February 1992. The Commissioner-General did not accept the JAB's finding since he believed that the JAB had improperly substituted its judgement for that of a medical board.

II. The Applicant, who was an instructor in the Syrian Arab Republic, says that he had specialist advice, from 1990, that he should not continue as an instructor because of a medical condition affecting his voice. He applied, in 1991, for assessment by a medical board to decide whether he was fit to continue as an instructor. The Medical Board met on 29 April 1992 and found that the Applicant was fit for service. The Applicant continued to press for a new examination. A new medical board, in January 1994, found that he was unfit for service. The Applicant takes issue with the

finding of the First Medical Board and contends that it erred in ignoring a specialist's recommendation and that it should have sought other expertise before rejecting this specialist's recommendation. He also complains that the members of the First Medical Board were not specialists in the relevant branch of medicine.

III. The Applicant's arguments concerning the alleged deficiencies of the First Medical Board were not made at the time of its finding. Although not satisfied with the decision of this medical board, the Applicant chose to wait until after the Second Medical Board had made its findings to raise a complaint. The Tribunal is not satisfied that circumstances exist which would enable it to embark on consideration of this issue. Indeed, there is an inherent contradiction in the Applicant's argument: he criticizes the First Medical Board and its findings, while accepting the Second and its findings, although the Second Medical Board conducted its enquiry in the same manner as the First. The only difference between the First Medical Board and the Second was that the Second had a partially different composition.

IV. The JAB expressed the view that the finding of unfitness by the Second Medical Board necessarily meant that the Applicant was unfit at the time of the First Medical Board's examination. In coming to this conclusion, the JAB would appear to assert that the Applicant's condition had not deteriorated in the intervening period. However, the Applicant himself refers to his voice progressively diminishing, and vanishing, over the three years before he was declared unfit.

V. However, the fundamental point is that neither the JAB nor this Tribunal can or should substitute its judgement for that of a medical board. Therefore, given the finding that the Applicant was fit at the time of the First Medical Board's examination, there is

no basis for the claim that his termination indemnity should have been calculated at the rate in effect at the time of the First Medical Board's finding. The Applicant's claim that his separation benefits should be paid in US dollars at the UN operational rate of exchange as of 31 May 1992, would appear to be a claim for such payment, irrespective of whether his separation had occurred following the First Medical Board's examination or on the date in 1994, on which he was actually separated from service.

The First Medical Board met on 29 April 1992. The Commissioner-General, by Circular of 5 January 1992, offered a more favourable exchange rate to certain Syrian employees of UNRWA who took voluntary retirement up to the end of February 1992. The provisions of this Circular do not apply to the Applicant because he did not leave the Organization until 1994. Even if the First Medical Board had declared him unfit, its finding would have come too late to have brought the Applicant within the terms of the Commissioner-General's Circular.

VI. For the foregoing reasons, the Tribunal rejects the Applicant's pleas, including the Applicant's request for costs.

(Signatures)

Samar SEN
President

Hubert THIERRY
Vice-President

Francis SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

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AT/DEC/800
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 800

Case No. 887: MERA RODRIGUEZ Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Ruby Mera Rodriguez, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 January 1996;

Whereas, on 6 November 1995, the Applicant filed an application containing pleas which, in part, request the Tribunal:

"...

(a) To rescind the decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board awarding the longevity step due to the Applicant as of 1 November 1992;

(b) To find and rule that the decision of the Respondent not to award the Applicant the longevity step due to her was motivated by prejudice and procedurally flawed;

...

(f) To find and rule that the Applicant's career with UNICEF has been adversely affected by the intrusion of discriminatory and prejudicial treatment by her supervisors;

(g) To award the Applicant additional appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(h) To order the Respondent to ensure that a fair and impartial assessment of the Applicant's performance be made for the period since 1988 and that all prejudicial materials from that period be removed from the Applicant's official file;

(i) To award the Applicant as costs, the sum of $6,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 1 April 1996;

Whereas the Applicant filed written observations on 8 May 1996;

Whereas, on 22 and 26 August 1996, the Applicant submitted further documents;

Whereas, on 21 October 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 1 November 1996, the Applicant submitted to the Tribunal an additional document, dated 31 October 1996, advising her of the Administration's decision to abolish her post;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 14 February 1969, as a Clerk/Typist at the G-2, step III level, on a three-month fixed-term contract. On 14 May 1969, the Applicant's appointment was converted to a probationary appointment. In November 1969, the Applicant was promoted to the G-3, step I level, as a Clerk/Typist in the Division of Public Information. On 1 February 1971, she was granted a permanent appointment at the G-3 level. On 1 November 1972, she was promoted to the G-4 level, as a Photo Librarian/ Secretary. On 1 January 1981, the Applicant was promoted to the G-5 level, as a Photo Assistant. With retroactive effect to January

1985, following the realignment exercise for all general service posts in accordance with CF/AI/1985-04 of 1 March 1985, the level of the Applicant's post was changed to G-6 on 28 August 1985 and she became a Photo Exhibit Assistant. With effect from 26 August 1988, the Applicant was transferred to the Photo Design and Distribution Unit (PDDU), as a Photo Assistant, at the same level. At the beginning of 1992, the PDDU merged with the Research and Editorial Section to form the Editorial, Publications and Photo Section, where the Applicant serves at the G-6, step X level, as a Photo Assistant.

The Applicant's performance evaluation reports (PERs) from 1970 to 1987 gave her evaluations varying from "very good" to "good". The PER covering the period from 15 June 1983 to 28 February 1984 evaluated the Applicant's performance as "good". Her supervisor noted (under Section III, column 6) that "the staff member works best when fully responsible for an assignment, which sometimes is problematic when input from several people is required". The Applicant's supervisor also stated (under Section III, column 7) that there was "some friction" in the Applicant's work relationships, "due to overlapping assignments". The PER covering the period from 1 March 1984 to 28 February 1985 evaluated the Applicant as "good". Her supervisor repeated comments similar to those made in the previous PER. The PER covering the period from 1 March 1985 to 28 February 1986 evaluated the Applicant as "good" to "very good".

On 30 October 1987, the Director, Division of Information and Public Affairs wrote to the Recruitment and Placement Officer with reference to the Applicant's candidacy for the post of Photo Assistant, stating, inter alia:

> "I wish to make clear the Division's view - which is that [the Applicant] does not meet the professional and technical standards now obtaining in the unit and would not be able, on

all the evidence of past performance, to maintain the photo operation at its current level of performance."

The Applicant replied to this memorandum on 11 November 1987, noting that the author of the 30 October memorandum had never been her direct supervisor, that the contents of that memorandum were inconsistent with her previous PERs, and that she could not be held responsible for upper level management decisions that had affected UNICEF's photo operation.

At its meeting of 12 April 1988, the New York General Service Appointment and Promotion Committee unanimously recommended the Applicant's appointment to the post of Photo Assistant (Post 00531). The Applicant assumed the duties of this post on 28 August 1988. On 22 September 1988, the Applicant wrote to her supervisor, noting that some of her responsibilities were being discharged by another staff member. She requested that she be allowed to perform these responsibilities, as provided in her job description.

Neither the Applicant nor the Respondent completed their respective portions of the PER for the period 1988-90. On 25 September 1990, the Applicant wrote to the Director, Division of Personnel (DOP). She objected to the fact that, contrary to the rules and regulations on completion of PERs, her supervisor had given her the PER for completion on his last day of service with UNICEF. The Applicant's PER covering the period from 29 November 1990 to 14 October 1991 evaluated her professional competence as "2" ("passable"); productivity as "3" ("good"); quality of work as "2" ("passable"); work relationships as "2" ("passable"); and communication skills as "3" ("good"). The Applicant submitted a detailed statement rebutting the PER, but did not sign Part 6 ("Final Review and Signature by Staff Member") of the PER.

On 26 June 1991, the Chief, PDDU, Division of Information (DOI), noted, for the record, three instances in which he believed that the Applicant had either exceeded her official job description

or had been uncooperative and intentionally obstructionist in her conduct. On 3 July 1991, the Chief, PDDU, DOI, made a similar note. The same day, the Applicant wrote a Note for the Record rebutting the three instances cited by the Chief in his Note for the Record. On 11 October 1991, the Director, DOI, wrote to the Director, DOP, in response to the 3 July 1991 note of the Applicant that was addressed to the Director, DOP, as to the hiring of the consultants, stating, inter alia:

> "The Photo Consultant also helped the Chief of Unit co-ordinate a number of photo missions that began when [the Applicant] was on extended annual leave from 26 November 1990 until 28 February 1991 ... The Consultant did help out, but not to the exclusion of [the Applicant]. Thus, the claim by [the Applicant] that her duties have been turned over to an outside Consultant is unsubstantiated."

On 19 August 1991, the Applicant wrote to the Division of Personnel and formally applied for the post of Photo Editor/ Photographer, Post P-3, Pat. No. 92019. She noted in the letter that this post described and incorporated the duties of her current post. On 19 March 1992, the Applicant received confirmation that another staff member had been selected for the P-3 post of Photo Editor/Photographer for which she had applied.

The Applicant did not sign her PER covering the period from November 1991 to December 1992; she noted on that PER, however, that she was not given the assignments described by her supervisor. The other portions of her PER are incomplete; the Applicant asserts that her comments were missing when this PER was put in her file.

On 15 April 1993, the Officer-in-Charge, Personnel Services Section (PSS), wrote to the Director, DOI, stating:

> "[The Applicant] completed 20 years of service with UNICEF on 14 February 1989 and five years at the ceiling of her present level (G-6/10) on 31 October 1992. She therefore became eligible to receive an extra step for longevity of service, as of 1 November 1992.

> If you are in agreement with the granting of an extra step, effective 1 November 1992, for [the Applicant], please let us have your recommendation together with original PERs covering the period 1 March 1986 to date, to support your recommendation."

On 1 July 1993, the Director, DOI, wrote to the Officer-in-Charge, PSS, stating:

> "... It was hoped that the 1992 PER of the staff member would have been completed by now in order to support a recommendation. Despite several reminders by the supervisor, [the Applicant] has not completed her part of the 1992 PER. We are, therefore, unable to recommend that [the Applicant] be awarded an extra step for length of service."

On 27 August 1993, the Applicant submitted a request for administrative review of this decision.

On 15 November 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 25 May 1995. Its conclusions and recommendations read, in part, as follows:

> "69. In reviewing the part of the appeal concerning the granting of the longevity step, the Panel observed that two criteria were applicable in that respect, as per information circular CF/IC/1986-57.
>
> 70. In accordance with the first criterion, the staff member should have had at least twenty years of service within the United Nations Common System and five years of service at the top step of the current grade. The Panel observed that, in a communication dated 15 April 1993, [the Officer-in-Charge], Personnel Services Section, stated that the Appellant met the requirements of that criterion.
>
> 71. The second criterion requires that the staff member's service be satisfactory. In that respect, the Panel observed that Appellant was denied the granting of the longevity step because 'the latest PER was not completed due to the Appellant's refusal to do so'. The Panel further observed that the incomplete PERs - even unsigned - in Appellants's file contained enough information to permit an assessment of her performance. Basing its assessments on the series of the

PERs in file, and taking the circumstances of the case into account, the Panel considered that the Appellant met the requirement of the second criterion.

Findings and Recommendations

72. The Panel unanimously found:

(a) that the Secretary-General had approved the delegation of authority to the Executive Director, UNICEF, for the review of administrative decisions requested by UNICEF staff members under staff rule 111.2(a); and

(b) the Appellant met the requirements of the criteria laid down for the granting of the longevity step in information circular CF/IC/1986-57.

73. The Panel unanimously recommends to the Secretary-General:

(a) To reject the part of the appeal contesting the delegation of authority to the UNICEF Executive Director;

(b) To approve the granting of the longevity step as of 1 November 1992.

74. The Panel unanimously decides to make no further recommendation in support of the appeal."

On 10 July 1995, the Applicant was advised by the Under-Secretary-General for Administration and Management of the Secretary-General's decision on the JAB's recommendation:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's findings and of its unanimous recommendation related to your performance evaluation reports (PER) and longevity step. As a matter of law and policy the Secretary-General cannot agree with the findings and conclusions reached by the Board whereby incomplete PERs would be used in the granting of longevity steps.

Beside 20 years of service and 5 years at the top step of the current grade, the basic criterion for the award of a longevity step is satisfactory service by the staff member. The main tool used at UNICEF for the purpose of evaluating staff services is the PER. Once properly completed, it

reflects the evaluation of a staff member's past services and constitutes a major guide and reference for the Administration's determination of promotions, contract renewals and some other entitlements.

As a matter of equality of treatment for all staff, an evaluation system such as the PER is efficient only when everyone complies with its procedures and goals. In terms of accountability, and to avoid any favouritism or arbitrariness, management has the duty to ensure that no decision, such as [the granting of the] longevity step, be taken without the proper assessment of a staff member's performance covering recent years.

The Secretary-General cannot accept that staff be rewarded regardless of their attitude or level of performance. In the present case, the Board has devoted only cursory attention to the question whether your performance was satisfactory within the meaning of the applicable UNICEF Information Circular. These two sentences do not address nor review documentary evidence on file showing indications of uncooperative work relations, refusal to observe long-standing administrative procedures and barely acceptable performance during some past years. Added to this is your refusal to complete and/or sign the PERs. When a staff member is convinced of the existence of major irregularities in the conduct of a PER, recourses are available to redress such situations if they really exist. The Secretary-General therefore rejects the Board's argument that '... incomplete PERs -even unsigned- in Appellant's file contained enough information to permit an assessment of [your] performance'. Failing valid, complete and signed PERs, the Secretary-General is therefore unable to endorse any award for a longevity step in your favour."

On 6 November 1995, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to deny the Applicant her longevity step is arbitrary and is tantamount to a disciplinary measure.

2. . The Applicant's rights to a fair and impartial assessment of her performance have been violated.

3. The Applicant was denied fair consideration for promotion.

4. The Applicant is being penalized for being a career staff member at a time when the Respondent appears determined to hire outside consultants.

Whereas the Respondent's principal contentions are:

1. The Respondent's refusal to grant a longevity step was a valid exercise of administrative discretion and was not motivated by prejudice or other extraneous factors.

2. The Applicant's appeal against a decision not to introduce a special performance procedure is time-barred.

3. The Applicant's challenge to UNICEF's performance appraisal system is without merit.

The Tribunal, having deliberated from 29 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals a decision of the Respondent dated 10 July 1995, rejecting a unanimous Joint Appeals Board (JAB) recommendation that the Applicant should be granted a longevity step since she fulfilled the necessary criteria. The Applicant claims that the decision of the Respondent not to award her the longevity step was motivated by prejudice and was procedurally flawed. The Applicant also asserts that the procedures established by UNICEF for performance evaluation fail to afford due process and that her career with UNICEF has been adversely affected by the intrusion of discriminatory and prejudicial treatment by her supervisors. Accordingly, the Applicant asks that the Tribunal rescind the decision of the Secretary-General not to accept the JAB's recommendation awarding her the longevity step, that she be

compensated for moral damages, that she be given an impartial assessment of her performance since 1988, and that her legal fees and expenses be awarded as costs.

II. The Tribunal has reviewed the Applicant's request for an oral hearing and for the production of various documents. In view of the substantial amount of documentation in the file, the Tribunal considers that there is sufficient evidence to decide the case and rejects these requests.

III. The main issue before the Tribunal is whether the denial of the longevity step to the Applicant is a valid exercise of the Secretary-General's discretion. The Tribunal's role is to ensure that the discretionary authority of the Secretary-General is not exercised in a manner that violates notions of justice or fairness.

IV. The criteria for eligibility for a longevity step are found in paragraph 3 of UNICEF information circular CF/IC/1986-57 of 23 May 1986:

> "[The longevity step] would be granted under the following criteria defined by the [ICSC]:
>
> (a) The staff member should have had at least twenty years of service within the United Nations Common System and five years of service at the top step of the current grade.
>
> (b) The staff member's service should have been satisfactory."

The fact that the Applicant has met the first criterion is not in dispute.

The second criterion requires that the staff member's service be satisfactory. The Respondent argues, in a letter dated 1 July 1993, that the Applicant was denied the longevity step because,

despite several reminders by the supervisor, she refused to complete or sign the performance evaluation report for 1992.

V. In the Tribunal's view, it is clear that the only justification invoked by the Administration at the time was the non-completion of the Applicant's 1992 performance evaluation report (PER). Such justification can be interpreted in two different ways. Firstly, it could be interpreted as rendering the whole performance of the Applicant unsatisfactory. The Tribunal cannot accept this interpretation.

In the Tribunal's view, the satisfactory performance required eligibility for the longevity step should result from an assessment of the Applicant's performance over a reasonable number of years. A staff member's performance cannot suddenly be considered unsatisfactory on account of a single episode that would nullify previous PERs showing that the Applicant's performance was satisfactory over a number of years.

Secondly, the 1 July 1993 decision could also be interpreted to mean that, inasmuch as the 1992 PER had not been signed by the Applicant, the Administration was unable to determine whether the requirement of satisfactory performance had been met. This interpretation seems to have been the one adopted by the Secretary-General when rejecting the JAB's recommendation. In the Tribunal's view, the refusal by the Applicant to sign her 1992 PER does not constitute an impediment for the Administration to determine whether the satisfactory service requirement had been met.

VI. The Tribunal recalls once more that the satisfactory service requirement for a longevity step is not limited to the most recent period of service. The Tribunal notes that the Applicant's performance was satisfactory from 1983 to February 1987 and that, as a consequence of the reporting officer's negligence, there is no PER for the period 1987-1990. The PER covering the period 29 November

1990 to 14 October 1991 contains ratings of "barely satisfactory". It is only in the PER covering the period November 1991 to December 1992 that unsatisfactory ratings appear. It is therefore clear that, in spite of the fact that the Applicant did not complete her last two PERs, the Administration had a sufficient basis for the assessment of her performance.

The Tribunal therefore finds that the Applicant's refusal to sign her 1992 PER does not constitute a valid reason to refuse her the longevity step. As this was the reason put forward by the Administration for its refusal to grant the longevity step, the Tribunal concludes that such refusal was unfounded.

The refusal to grant this step to the Applicant verges on a disciplinary measure imposed on the Applicant for having contested her PERs. This lacks a basic notion of fairness on the part of the Respondent. The Tribunal agrees with the JAB that, taken as a whole, the Applicant's record indicated that she met the second criterion for the award of the longevity step.

VII. The Applicant contends that the procedures established by UNICEF for performance evaluation fail to accord due process. The Tribunal will not enter into considerations of the performance evaluation system. The Respondent stated correctly that UNICEF's performance appraisal system is established by a legislative text, which was promulgated after consultation with the staff. By choosing to stay at UNICEF once this procedure was promulgated, it became part of the Applicant's conditions of service and she is bound by its terms whether she personally agrees with them or not.

VIII. The Applicant also alleges that her supervisors subjected her to prejudicial and discriminatory treatment. In support of her allegation, the Applicant asserts, inter alia, the following:

(a) Persistent and continued irregularities surrounding her work assignments;

(b) The use of consultant's services to perform the core functions of her post;

(c) Violations of procedure in the preparation of her PERs; and

(d) Derogatory statements aimed at discrediting her performance.

IX. Although the Tribunal is sensitive to the Applicant's claim that there was tension between herself and her supervisor, the Tribunal finds that there is insufficient evidence to conclude that the above-mentioned actions were motivated by prejudice or discrimination. The Tribunal has consistently held that an applicant, when alleging discrimination or prejudice, has the burden of proving such allegations. (Cf. Judgements No. 312, Roberts (1983) and No. 470, Kumar (1989)). It appears to the Tribunal that the Applicant has failed to meet this burden of proof. The Tribunal must dismiss these pleas.

X. Regarding the Applicant's plea that her performance should be assessed by an impartial third party, the Tribunal agrees with the Respondent that this issue is time-barred.

XI. For the foregoing reasons, the Tribunal concludes as follows:

1. The Applicant has met the criteria in information circular CF/IC/1986-57 regarding entitlement to the longevity step. The Tribunal therefore orders the Respondent to grant this step retroactively, with effect from the date on which the Applicant's entitlement arose.

2. All other pleas concerning the abolition of the Applicant's post and her possible termination have not been considered by the JAB and are therefore not properly before the Tribunal.

3. The Tribunal rejects the remainder of the Applicant's pleas, including her request for costs.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/801
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 801

Cases No. 894: PATTINSON
No. 895: PATTINSON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Ms. Deborah Taylor Ashford;

Whereas, at the request of Joy Pattinson, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 29 April and 31 August 1994, 28 February, 31 May and 31 August 1995, the time-limit for the filing of an application to the Tribunal;

Whereas, on 7 August 1995, the Applicant filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 13 October 1995, the Applicant, after making the necessary corrections, filed two applications containing the following pleas requesting the Tribunal, inter alia:

IN CASE NO. 894

"...

2.2 To rescind the decision taken on behalf of the Respondent to withhold the within-grade salary increment that was due to the Applicant on 1 November 1989, communicated to her by memorandum of the Chief of Personnel Administration, UNOG, dated 30 October 1989;

2.3 To order the Respondent to restore to the Applicant the within-grade salary increment that was due to her as of 1 November 1989 with effect from that date, adjust her salary as of that date accordingly, and pay her the salary arrears that thus become due to her;

2.4 To include in the amount of compensation payable to the Applicant in the event that the Respondent decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute, appropriate and adequate compensation for the loss of pension benefits concomitant upon the withholding of an additional within-grade salary increment as of 1 November 1989;

2.5 To order the Respondent to pay to the Applicant appropriate and adequate compensation for the infringement of her rights through flawed procedures, denial of due process and unfair treatment."

IN CASE NO. 895

"...

2.2 To find that the Joint Appeals Board was in error when it ruled that it was not competent to consider the appeal filed by the Applicant on 20 July 1994 against the decision taken on behalf of the Respondent on 11 April 1994 by the Chief of Personnel Administration, UNOG, and that the appeal was not receivable;

2.3 To rescind the aforementioned decision of the Chief of Personnel Administration, UNOG;

2.4 To order the Respondent to grant the Applicant an additional within-grade salary increment as of 1 November 1990, adjust her salary as of that date accordingly, and pay her the salary arrears that thus become due to her;

2.5 To include in the amount of compensation payable to the Applicant in the event that the Respondent decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute, appropriate and adequate compensation for the

loss of pension benefits concomitant upon the denial to her of an additional within-grade salary increment as of 1 November 1990."

Whereas the Respondent filed his answer on 20 March 1996;

Whereas the Applicant filed written observations on 26 April 1996;

Whereas on 28 August 1996, the Applicant submitted further documents;

Whereas the facts in the cases are as follows:

The Applicant entered the service of the United Nations as a clerk on 23 May 1960. She served on a series of short-term appointments, through 12 October 1979, as a clerk, shorthand-typist and secretary in UNOG, UNHCR, UNCTAD, UNICEF and UNDP.

Beginning 1 September 1980 and continuing through 1981, the Applicant served on fixed-term appointments with UNIDO, Geneva, and, thereafter, on short-term appointments, until 1 August 1985, when she was given fixed-term appointments, by the Geneva Staff Coordinating Council, expiring on 31 December 1986. On 1 August 1986, she was appointed to a G-5 level post.

On 1 January 1987, she received a one-year fixed-term appointment with the Geneva Staff Coordinating Council. Her appointment was extended for a further one-year fixed-term period, when she was transferred to the Geneva Branch of the Department for Disarmament Affairs. With effect from 1 January 1988, she was given a two-year fixed-term appointment, through 31 December 1989. The Department for Disarmament Affairs did not recommend an extension of her appointment beyond 31 December 1989.

With effect from 8 January 1990, the Applicant received a fixed-term appointment that was extended for short periods until 1 September 1990, when she received a fixed-term appointment for one year. During the period from January 1990 to August 1991, she served for three months (January-April 1990) as secretary in the

Office of the Coordinator for United Nations Humanitarian and Economic Assistance Programmes, relating to Afghanistan. She was assigned to the Security and Safety Unit, General Services, from September 1990 to January 1991. From January to August 1991, she was temporarily assigned to the Office of the Director-General. Thereafter, she was on sick leave on full pay, from 1 September 1991 to 23 October 1991, on sick leave with half pay from 24 October 1991 to 2 April 1992 and on special leave with half pay from 3 April 1992 to 16 March 1993.

On 29 September 1989, while the Applicant was working as an Assistant to the Director, Department of Disarmament Affairs (DDA), the latter informed the Chief, Personnel Administration Section (PAS), UNOG, that he did not intend to approve the extension of the Applicant's appointment which was due to expire on 31 December 1989, citing as the reason the "deterioration of the standard of service" of the Applicant. On 19 October 1989, the Director, DDA, also recommended to the Chief, PAS, the withholding of the Applicant's within-grade salary increment.

In a reply dated 25 October 1989, the Chief, PAS, requested from the Director, DDA, the special report required by paragraph 16(a) of administrative instruction ST/AI/240/Rev.2 of 28 November 1984, in cases of recommendations for withholding within-grade salary increments. On 30 October 1989, the Chief, PAS, wrote to the Applicant informing her of the Director, DDA's recommendation to withhold her within-grade salary increment. He also advised her that he had requested the Director, DDA, to prepare the special report, required by ST/AI/240/Rev.2, which would be transmitted to the Applicant upon receipt and which she would be entitled to rebut.

On 31 October 1989, the Director, DDA, asked the Chief, PAS, to accept the 29 September 1989 memorandum which provided a "brief description of the reasons requiring action of withholding the within-grade salary increment" as the special report.

On 1 November 1989, the Chief, PAS, advised the Applicant as follows:

> "I am sending you herewith a copy of [the Director/DDA's] memorandum of 31 October 1989 and of the attachment mentioned therein, which constitute the special report required in accordance with administrative instruction ST/AI/240/Rev.2 of 28 November 1984."

On the same date, the Applicant asked that the Personnel Action Form, issued to withhold the within-grade salary increment, be "considered null and void and immediately withdrawn".

On 30 November 1989, the Applicant filed a rebuttal against the special report by the Director, DDA. On 14 December 1990, the Rebuttal Panel recommended that "while professionally maintaining the Director, DDA's decision, [the Applicant] should be granted an additional within-grade salary increment in 1991 if, by that time, in the opinion of her new chief, her performance satisfies staff rule 103.8."

In a cable dated 21 February 1991, the Administrative Officer, DDA, noted that the Under-Secretary-General for Disarmament Affairs had informed the Administrative Office, DDA, that he concurred with the Panel's recommendation and that he had "no views with regard to any future recommendations that might be made by [the Applicant's] new Chief".

On 28 February 1991, the Chief, PAS, transmitted to the Applicant a copy of the Rebuttal Panel's report and the appraisal by the Under-Secretary-General for Disarmament Affairs. The latter stated that "[i]n view of the findings of the appraisal, no further action is being taken in connection with the withholding of your salary increment".

In a report dated 16 March 1991, the Applicant's performance for the period 9 April through 30 November 1990 was evaluated as a "very good performance" by the Chief of the Security and Safety Unit.

On 5 July 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 10 July 1991, the Deputy Chief, Security and Safety Unit, evaluated the Applicant's performance for the period 9 April 1990 to 18 January 1991 as "below standard". No within-grade salary increment was paid, despite the issuance of a Personnel Action Form dated 19 March 1991, stating that the step would be paid with effect from 1 November 1990.

On 16 July 1993, the JAB adopted its report. Its conclusions and recommendations read, in part, as follows:

"Conclusions and Recommendations

...

The Panel, taking into account ... the efforts made by the Administration to find her various assignments after her fixed-term appointment with the Department of Disarmament Affairs expired on 31 December 1989, concludes that the Administration has made a genuine showing to be helpful and to be fair to the Appellant.

While recognizing that there have been procedural irregularities, the Panel is convinced that such irregularities did not change the substance of the administrative decision to withhold the within-grade salary increment. In view of the above, and in view of the fact that the overall treatment of the Appellant has been a fair one, the Panel decides not to make any recommendation in support of the appeal.

The Panel decides to make a general recommendation to the Secretary-General of the United Nations to revise paragraph 16(a) of Administrative Instruction ST/AI/240/Rev.2 and to change the wording of that paragraph - for the reasons specified in paragraphs 29 and 30 of this JAB report - to read as follows:

'(a) there is a recommendation from the department or office to withhold the within-grade salary increment because of unsatisfactory service or conduct. This report must be submitted at least one month before the salary increment is due.'"

On 11 August 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report and noted that it made no recommendation in support of your appeal. Accordingly, he will maintain the contested decision to take no further action on your case.
>
> As regards the Board's general recommendation, contained in paragraph 6 (a) of administrative instruction ST/AI/240/Rev.2 and to change the wording of that paragraph, the Secretary-General will examine the Board's recommendation in order to determine whether a change in the Staff Rules and policies is warranted".

On 7 March 1994, the Applicant requested the Chief, PAS, to grant her the unpaid within-grade salary increment that was due on 1 November 1990.

On 11 April 1994, the Chief, PAS, replied as follows:

> "You will recall that, while you rightly mentioned a recommendation on 14 December 1990 of the rebuttal panel that reviewed your case related to the withholding of your salary increment, we informed you on 28 February 1991 of the decision of the Under-Secretary-General for Disarmament Affairs contained in the fax dated 21 February 1991 from DDA [the Director, DDA's] decision, as also recommended by the rebuttal panel, to withhold the within-grade increment that had been due to you in October 1989.
>
> As to whether or not a within-grade salary increment should have been granted to you a year later was contingent upon a separate assessment of your performance by your new Chief even though the fax dated 21 February 1991 from DDA New York indicated that '[the USG, DDA] has no views with regard to any future recommendations that might be made by [the Applicant's] new Chief'.
>
> In this connexion, a report was established on 10 July 1991 by the Deputy Chief of Security and Safety Unit rating your overall performance as below standard.

Based on the facts, we wish to inform you that the UNOG Administration has consequently considered your case closed."

On 25 April 1994, the Applicant requested the Secretary-General to review the administrative decision cited above. On 21 July 1994, the Applicant lodged an appeal with the JAB against the decision to deny her the within-grade salary increment.

On 11 May 1995, the JAB adopted its report. Its findings, recommendations and conclusions read, in part, as follows:

"The Panel found that, in the present case, the letter was only recalling for the Appellant the decision taken previously concerning the withholding of her within-grade increment, and that it could not be considered as a new administrative decision affecting her rights. The Panel further considered that this issue had already been examined by a previous JAB Panel (in JAB Case No. 223) and that it could not conclude as to its receivability since it would be tantamount to re-opening a case which had led to a confirmative decision of the Panel's conclusion from the Secretary-General. Therefore, the Panel concluded that the appeal was not receivable ratione materiae.

Besides, the Panel found that the Appellant took the opportunity to appeal against the letter of the Chief of PAS dated 11 April 1994, to ascertain whether she would meet the time limits under staff rule 111.2 whereas the decision that she should have appealed against was the decision dated 28 February 1991. In failing to do so, the Appellant's request was time-barred. Therefore, the Panel found that her appeal was not receivable ratione temporis.

Conclusions and Recommendations

The Panel concludes that the letter from the Chief of Personnel Administration Section recalling for the Appellant that her case was closed is not an administrative decision on which an appeal can be based. Therefore, it is outside the scope of the mandate of the JAB and not receivable."

On 30 June 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised her as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has noted the Panel's conclusions that your appeal was not receivable ratione materiae and ratione temporis. The Board bases its conclusions on the finding that the administrative decision being appealed is in fact that [decision] conveyed in the letter of 28 February 1991, which decision was appealed by you and examined by the JAB which issued its report No. 223. The Board also found that the 11 April 1994 letter conveys no new administrative decision but rather recalls that of 28 February 1991. The Secretary-General is in agreement with the Board's findings and conclusions, and accordingly has decided to maintain the contested decision and to take no further action on your case."

On 13 October 1995, the Applicant filed with the Tribunal the two applications referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent disregarded mandatory procedures designed to protect staff interests by issuing the special report on the eve of the date on which the Applicant's salary increment was due, thus denying the Applicant due process.

2. The denial of the Applicant's within-grade salary increment was influenced by bias or other extraneous factors.

Whereas the Respondent's principal contentions are:

1. By informing the Applicant of her right to rebut an appraisal leading to the decision not to grant a within-grade salary increment, and by following a fair and reasonable procedure, the Respondent accorded the Applicant due process.

2. The denial of the Applicant's within-grade salary increment was not influenced by bias, abuse of power or other extraneous factors.

3. A decision not to re-open a time-barred claim is not subject to further appeal.

The Tribunal, having deliberated from 30 October to 21 November 1996, now pronounces the following judgement:

I. As the two applications brought by this Applicant relate to a single set of factual circumstances, the Tribunal joins the applications and addresses the two different claims raised in this single judgement.

II. Both claims stem from a decision by the Respondent to withhold 1989 the Applicant's 1989 within-grade salary increment. The Applicant challenges the procedure by which this decision was made and implemented. She also challenges the subsequent failure of the Respondent to grant her an additional 1990 within-grade salary increment, as recommended by the Rebuttal Panel.

III. ST/AI/240 provides that, when there is a recommendation to withhold the within-grade salary increment because of unsatisfactory service or conduct, a special report "must be submitted before the salary increment is due". The administrative instruction further provides that special reports "must be brief and relate directly to the facts requiring the action" and that they "shall be made by the head of the department or office in the form of a memorandum to the Assistant Secretary-General for Personnel Services".

IV. The Applicant's salary increment was due on 1 November 1989. On 19 October 1989, the Applicant's supervisor, in response to a notification of the upcoming increment, informed the Chief of Personnel Service that he recommended withholding of the increment. His brief memorandum simply stated that the staff member had failed to meet the requirements of staff rule 103.8(a) during the period in question. In a reply of 25 October 1989, the Chief of the Personnel Administration Section requested from the Applicant's supervisor the

special report prescribed by ST/AI/240 for withholding within-grade salary increments.

V. The Applicant was informed on 30 October 1989 of the recommendation to withhold her salary increment, due on 1 November. She was also informed that her supervisor had been requested to prepare a special report, which she would have the opportunity to rebut within one month of receipt. She was further informed that her salary increment would be withheld, as of 1 November. On 31 October 1989, the Applicant's supervisor requested that a memorandum he had prepared one month earlier regarding the Applicant be considered as the special report required. This memorandum concerned the non-extension of the Applicant's appointment and set forth a number of concerns relating to the Applicant's performance.

VI. The Applicant contends that the rules require the preparation of a specific report for the purpose of withholding salary increment. Although the memorandum proffered by the Applicant's supervisor was not prepared for this purpose, the Tribunal finds that in form and content it otherwise fulfils the requirements of ST/AI/240 cited above. It set forth the relevant performance issues supporting the recommendation against a salary increment and the reasons for the decision.

VII. The Applicant also contends that her salary increment should not have been withheld prior to the submission of a special report and the completion of the rebuttal process to which she was entitled. The Tribunal agrees that the actions of the Respondent were such that the Applicant was not given an opportunity to challenge the decision before it was made. However, as the Respondent points out, the decision was reviewed subsequently, and the Applicant could have been granted the increment retroactively.

The Tribunal finds that, in this respect, the Applicant was afforded due process and that the actions of the Respondent were reasonable.

VIII. The Applicant did avail herself of the opportunity to rebut the withholding of her salary increment. The recommendations of the Rebuttal Panel are at issue in her second claim, which was found not to be receivable by the Joint Appeals Board. The Rebuttal Panel recommended that the withholding of the increment should be provisionally maintained and that the Applicant should be granted an additional within-grade salary increment in 1991, if her new supervisor considered her performance satisfactory. The Under-Secretary-General for Disarmament Affairs concurred with the Rebuttal Panel's recommendation to uphold the decision to withhold the salary increment, and the Applicant was so informed on 28 February 1991.

IX. The Applicant contends that, in concurring with the Rebuttal Panel, the Respondent undertook to grant the Applicant an additional within-grade salary increment, conditioned on her performance evaluation by the new supervisor, and that the decision not to grant this increment was only communicated to her in April 1994, following her inquiry. The Respondent contends that his decision was communicated in February 1991, as part of the decision on the Rebuttal Panel's recommendations. Any review at this point would therefore be time-barred, as held by the Joint Appeals Board.

X. In reviewing the Respondent's decision of February 1991, the Tribunal notes the specific reference to future recommendations that might be made by the Applicant's new supervisor and the statement that the Under-Secretary-General "has no views" with regard to this matter. The Tribunal considers this language to mean that the Respondent did not concur with the Rebuttal Panel in its recommendation regarding the additional increment, but only

concurred with the Rebuttal Panel in its recommendation regarding the withholding of the increment.

XI. Arguably, the Respondent subsequently made a decision not to grant the Applicant an additional salary increment. While this decision would therefore be reviewable, it was not a decision relating to the recommendations of the Rebuttal Panel, which are of course non-binding and which were addressed in the Respondent's 1991 communication. The Applicant's claim is based on these recommendations, but as the Tribunal finds that the Respondent did not accept the particular recommendation of the Panel with regard to the additional increment, the claim is without foundation.

XII. For the foregoing reasons, the applications are rejected in their entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary